82-1335

Case No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

JAMES A. RHODES, et al.,

Petitioners,

vs.

LARRY STEWART,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONERS

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QUESTIONS PRESENTED

I. IS AN AWARD OF ATTORNEYS' FEES MADE TO A PLAINTIFF PURSUANT TO 42 U.S.C. SECTION 1988 PROPER WHERE THE PLAINTIFF HAS NOT PREVAILED AS A PRACTICAL MATTER?

II. IS AN AWARD OF ATTORNEYS' FEES MADE PURSUANT TO 42 U.S.C. SECTION 1988 PROPER WHERE THERE HAS BEEN NO ADJUDICATION OF A PRESENT RIGHT OR PROSCRIPTION OF A PRESENT WRONG?

III. SHOULD THE PLAINTIFF BE ALLOWED ATTORNEYS' FEES FOR ALL THE TIME SPENT LITIGATING A MATTER WHERE HE PREVAILS IN ONLY A FRACTION OF HIS CLAIMS AND RECEIVES ONLY PART OF THE RELIEF REQUESTED?

PARTIES

The petitioners in the action are James A. Rhodes, the former governor of the State of Ohio, George F. Denton, the former director of the Ohio Department of Rehabilitation and Correction and Ted Engle, Superintendent of the Chillicothe Correctional Institute (CCI). The respondent is Larry Stewart, a former prisoner of the State of Ohio.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is unreported. (A-4). The decision of the United States District Court for the Southern District of Ohio, Eastern Division is unreported. (A-21).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered May 25, 1982. A petition for rehearing and suggestion of rehearing en banc was denied on November 9, 1982. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

This case involves 42 U.S.C. Section 1988:

Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92—318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil

Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JAMES A. RHODES, et al.,
Petitioners,

v.

LARRY STEWART,
Respondent.

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

Petitioners James A. Rhodes, George F. Denton and Ted Engle respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 25, 1982.

STATEMENT OF THE CASE

This case originated with the filing of a complaint in the United States District Court for the Southern District of Ohio, Eastern Division on January 17, 1978. (A-35). The case was assigned number C-2-78-36. Following the filing

of an answer, certain stipulations of fact were made and the case briefed. A decision was reached, based on the briefs and stipulations, on February 23, 1981. (A-21). The opinion and order were amended twice. (A-13 – A-20).

On June 4, 1981, following an application and response, counsel for the plaintiffs were awarded attorneys' fees. (A-8).

The action was instituted by two inmates of the Chillicothe Correctional Institute (CCI), under 42 U.S.C. Section 1983, claiming they had been denied their rights under the First Amendment to the Constitution of the United States to receive "Hustler Magazine". (A-39).

Ohio prisoners were originally denied access to "Hustler" in May, 1976 pursuant to former Administrative Regulation 814. (A-22). It was never proved, stipulated or found that the plaintiffs, Larry Stewart and Albert Reese, appealed the ban on "Hustler" through proper administrative channels.

In December, 1976, the Ohio Department of Rehabilitation and Correction adopted Ohio Administrative Code Section 5120-9-19. (A-23). The regulation was adopted in compliance with an order of the United States District Court for the Northern District of Ohio, Western Division in *Taylor* v. *Perini*, 413 F. Supp.189, 214 (N.D. Ohio 1976). Section 5120-9-19 became effective on January 1, 1977. (A-23). The regulation sets forth the criteria by which printed material may be banned from Ohio's prisons as well as the steps necessary to appeal a decision to bar a particular publication. The regulation replaced former A. R. 814. (A-49).

The plaintiffs allegedly made their desire to receive "Hustler" known, for the first time, to unnamed employees of CCI in June 15, 1977. (A-37). Those unnamed and unknown CCI employees were never made parties to the suit. The plaintiffs never made their desires known to

any of the three named defendants. The plaintiffs never appealed the ban on the magazine pursuant to Section 5120-9-19 (F) and (G). None of the defendants were aware of the plaintiffs' desires or that their employees had allegedly denied the plaintiffs' requests.

On January 17, 1978, one year after Section 5120-9-19 had gone into effect, and without attempting an administrative appeal, the plaintiffs filed suit in the district court requesting injunctive relief. (A-35).

Mr. Stewart was paroled on March 15, 1978. Stewart was given a final release from parole on January 17, 1980. Stewart has not been re-imprisoned in Ohio and his chance of re-imprisonment is no greater than any person.

Mr. Reese died on February 18, 1979.

The district court entered its judgment on April 2,1981 (A-17); more than three years after Stewart's parole and two years after Reese's death. The district court found Section 5120-9-19 to be constitutional and instructed the plaintiff to appeal the decision to ban "Hustler Magazine" pursuant to Section 5120-9-19 (F) and (G). (A-15). As a result of the order of February 23, 1981 and its amendment, the plaintiff is now in the same position he was in on the date he filed suit; i.e. he has a right to appeal the ban of the magazine pursuant to a constitutional regulation. However, since Stewart was released three years before the order, he has failed to appeal. No inmate of any Ohio prison has sought permission to receive "Hustler" since January 1, 1977.

The district court awarded attorneys' fees of $5,325.85 to plaintiff's counsel on June 3, 1981, finding that the plaintiff had prevailed. The award was made pursuant to 42 U.S.C. Section 1988. The defendants appealed the award of attorneys' fees to the United States Court of Appeals for the Sixth Circuit as case no. 81-3395. The

award of attorneys' fees was upheld (A-4) and a petition for rehearing was denied. (A-3).

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. Conflict With Decisions of This Court

It is undisputed that at the time suit was filed the Ohio Department of Rehabilitation and Correction was screening publications under a constitutionally sound policy, a policy that provided adequate procedural safeguards. (A-30). *Procunier* v. *Martinez*, 416 U.S. 396, 417 (1974). It is also undisputed that the plaintiff failed to appeal the decision to ban "Hustler" pursuant to the constitutionally adequate administrative regulation. (A-37). Because the plaintiff had available an adequate remedy accompanied by procedural safeguards to redress an alleged wrong, he suffered no deprivation without due process of law. *Parrat* v. *Taylor*, 451 U.S. 527 (1981).

Further it is clear that the plaintiff was in the same position on the day this case was decided by the district court as he was on the day he filed suit; i.e. he had a right to appeal pursuant to a constitutionally sound regulation. (A-13). The district court's decision had not established the existence of a right, added to the enjoyment of an established right, or proscribed a present wrong. The plaintiff had won, at most, an advisory opinion informing him that he had a right to appeal.

The plaintiff had not prevailed in a practical manner. The plaintiff had won nothing; the district court's order informed him only that he had a right to appeal. In order to establish a right to attorneys' fees, the plaintiff in a 42 U.S.C. Section 1983 action must establish that the suit has resulted in some type of practical relief. *Hanrahan* v. *Hampton*, 446 U.S. 754, 758-759 (1980).

The fact that no practical relief was obtained is further illustrated by the fact that the district court did not set

aside the ban on "Hustler" and the fact that no Ohio prisoner has yet appealed the ban pursuant to Ohio Administrative Code Section 5120-9-19. It is also clear that the original plaintiffs were in no position to appeal the ban on the date of the district court's decision. One of the original plaintiffs was dead and the other was no longer a prisoner. No live case or controversy existed at the time of the district court's decision. Since no question of present right existed, no claim existed under 42 U.S.C. Section 1983. Since no claim existed under 42 U.S.C. Section 1983, it is impossible for the plaintiff to have prevailed within the meaning of 42 U.S.C. Section 1988. See *Ashcroft* v. *Mattis*, 431 U.S. 171 (1977).

A comparison of the issues raised in the complaint (A-37—A-39), the relief sought (A-39) and the district court's order (A-28-31, A-13) reveals that if the plaintiff prevailed, he prevailed on only a fraction of the issues raised and obtained only a small part of the relief requested. This Court presently has before it a case involving a similar question. In *Hensley* v. *Eckerhart*, 664 F. 2d 294 (8th Cir. 1981), *cert. granted*, _____U.S.____, 71 L. Ed. 2d 847 (1982), an award of attorneys' fees was made for all the time spent litigating a case. The award was not proportioned to reflect the extent to which the plaintiffs had prevailed on their claims. Certiorari was granted to review the issue.

3. Conflict With Other Circuits.

The decision of the appellate court in this matter is not only in conflict with this Court's decision in *Hampton*, *supra*, but also conflicts with the decisions of at least three other federal courts of appeals.

The award of attorneys' fees in this matter was upheld by the appellate court based on a holding that:

> Applying the pronouncements of *Northcross*, plaintiffs below have prevailed in a practical manner in that *they were afforded the right to a determination under regulations the defendant had previously ignored.* Moreover, they became entitled to that determination within *60 days* of a request for such a determination, which time period is not mandated by the regulations. (emphasis added; A-5--A-6).

The appellate court was in error. The plaintiff had not prevailed in a practical manner.

The plaintiff was afforded no right to a determination through his suit. His right to a determination was established by the enactment of Section 5120-9-19 on January 1, 1977. The plaintiff's suit was filed more than a year later, on January 17, 1978.

The regulation had not been ignored by the defendants. The defendants were never given an opportunity to determine whether or not "Hustler" should be banned from Ohio prisons under Section 5120-9-19. The defendants never reviewed "Hustler" under Section 5120-9-19 because the plaintiff ignored the regulation. The plaintiff never appealed the alleged ban pursuant to Section 5120-9-19. Instead of following a constitutionally adequate avenue of appeal, *Procunier* v. *Martinez*, *supra*; *Guajardo* v. *Estelle*, 580 F. 2d 748 (5th Cir. 1978); *Blue* v. *Hogan*, 553 F. 2d 960 (5th Cir. 1977); *Aikens* v. *Jenkins*, 534 F. 2d 751 (7th Cir. 1976), the plaintiff sought review in a federal court.

The appellate court's finding that the plaintiff prevailed because he became entitled to a determination within sixty days and that the period is not mandated by the regulation is without foundation in fact and law. The district court, in fact, mandated thirty days for a determination (A-13); approximately the time mandated by Section 5120-9-19

(G)(2). (A-47). A change of a day or two (if such a change was in fact ordered since the district court also ordered that the regulation be followed and found the regulation constitutional) hardly puts the plaintiff in the position of a prevailing party in the "practical" sense of the word.

Attorneys' fees awards are discussed in great detail in *Smith* v. *University of North Carolina*, 632 F. 2d 316, 346-353 (4th Cir. 1980). It was held:

> As we comprehend the rule, *to "prevail" a party must establish in an enduring way that he or she was right on a matter in issue and that the litigation activities served to establish the existence of the right or contributed to an enjoyment of the right.* There need not be a formal adjudication in the party's favor; a vindication of rights obtained by a settlement or consent judgment may be sufficient as may a showing that the plaintiff's actions were a catalyst which caused the defendant to remedy his errant ways. However, *what always must occur is the establishment of a right or the proscription of a wrong.* (footnote omitted; emphasis added). *Id.* at 346 - 347.

Here, as the district court recognized, the right was in existence and the only step necessary to the enjoyment of the right was the filing of an appeal under Section 5120-9-19. The plaintiffs ignored the appeal process. The decision maintains the *status quo* on the date the suit was filed.

It was also held in *Smith*, *supra* at 347, citing *Harrington* v. *Vandalia-Butler Board of Education*, 585 F. 2d 192, 197 (6th Cir. 1978); *cert. denied*, 441 U.S. 932 (1979).

> In order to be a 'prevailing party', a plaintiff must have been entitled to some form of relief at the time suit was brought.

In this case, the plaintiff was entitled to no relief. The plaintiff had failed to pursue the proper administrative remedy.

It is also clear that the plaintiff has failed to obtain the primary relief sought, an injunction prohibiting the defendant from denying the plaintiff the opportunity to receive "Hustler". (A-39). The plaintiff has failed to succeed on the central issue of his suit and is not entitled to attorneys' fees. *Coen* v. *Harrison County School Board*, 638 F. 2d 24, 26 (5th Cir. 1981). The plaintiff has only succeeded in obtaining a declaration that he has a right to appeal the decision to ban the magazine. Under *Coen*, *supra* and *Powe* v. *City of Chicago*, 664 F. 2d 639, 652 (7th Cir. 1981) such a decision does not entitle the plaintiff to attorneys' fees. The plaintiff only succeeded in obtaining a judicial declaration that there existed, on the day suit was filed, a constitutionally adequate avenue of appeal.

C. Importance Of The Issue

Recent decisions involving awards of attorneys' fees have resulted in a variety of conflicting decisions. The rates have varied widely; there exists no rule for determining the number of hours that should be compensated for performing similar tasks; and apparently there exists no uniform definition of "prevailing party". This Court's decision in *Hanrahan*, *supra* has not resolved the issue.

The confusion over the definition of the term "prevailing party" can be seen in the decisions cited above. Other federal courts of appeals have upheld awards of attorneys' fees only where it was shown that the plaintiff has gained the enjoyment of a present right or the proscription of a present wrong. In this case the plaintiff obtained only a bare declaration of his rights, see *Bell* v. *Board of Education of Akron Public Schools*, 491 F. Supp. 916, 942 (N.D. Ohio 1980); at most, a theoretical victory and not the practical or real victory necessary to establish his right to attorneys' fees. *Ohland* v. *City of Montpelior*, 467 F. Supp. 324, 350 (D. Vt. 1979).

The fact that this case presents an excellent vehicle for this Court to define the term "prevailing party" and resolve an issue of national importance is no where better illustrated than by comparing the appellate court's decision in this case and its decision in *Harrington*, *supra*. Here, the plaintiff has failed to obtain any real relief; all he has obtained is an opinion that a non-existant regulation was not followed in 1976 and instructions to appeal under a regulation that was in effect a year prior to the filing of his complaint. In *Harrington*, *supra* at 197-198, the appellate court held that a plaintiff must obtain more than a mere determination of wrong to establish his status as a prevailing party within the meaning of 42 U.S.C. Section 1988.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari have been served on the respondent by forwarding such copies to Larry J. McClatchey, Brownfield, Bowen and Bally, 140 East Town Street, Columbus, Ohio 43215, by United States mail, postpaid, this_____day of February, 1983. I further certify that all parties required to be served have been served.

ALLEN P. ADLER
Assistant Attorney General

Case No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES A. RHODES, et al.

Petitioners,

vs.

LARRY STEWART,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

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No. 81 – 3395

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY STEWART, et al.,
Plaintiffs–Appellees

v.

JAMES RHODES, et al.,
Defendants–Appellants

ORDER
Filed November 9, 1982

BEFORE: MERRITT and KRUPANSKY, Circuit Judges*

Upon consideration, no judge having favored rehearing en banc, the Court concludes the issues joined in the petition for rehearing were fully considered in the original submission and decision in the present case. Accordingly, the petition for rehearing is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

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*The Honorable Frank W. Wilson, Chief Judge of the U.S. District Court for the Eastern District of Tennessee, sitting by designation, participated in the initial panel decision, however, Judge Wilson died on September 29, 1982, prior to consideration of the present order.

No. 81 – 3395
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LARRY STEWART, et al.,
Plaintiffs–Appellees

v.

JAMES RHODES, et al.,
Defendants –Appellants

ORDER
Filed May 25, 1982

BEFORE: MERRITT and KRUPANSKY, Circuit Judges; and WILSON, District Judge.*

This is an appeal from an award of attorney fees to the plaintiff-appellees, inmates of the Chillicothe Correctional Institute, by Judge Robert M. Duncan of the Southern District of Ohio in connection with appellees' civil action pursuant to 42 U.S.C. § 1983 challenging the defendant–appellants' refusal to permit plaintiffs to receive *Hustler* magazine.

The trial court found, on stipulated facts, that the defendants had not implemented their own applicable regulations in proscribing *Hustler* as obscene and therefore the defendants were ordered to conduct a hearing within sixty days in accordance with the Chillicothe Correctional Institute's regulation § 51--20–19 governing obscene material. No appeal was taken from this order. Accordingly, no issue with regard to the validity of the order is before this Court.

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* The Honorable Frank W. Wilson, Chief Judge of the U.S. District Court for the Eastern District of Tennessee, sitting by designation.

Upon entry of this order, the plaintiffs sought attorney fees pursuant to 42 U.S.C. § 1988 and, over objections, were awarded an amount of $5,306.25 in fees. Principally, the defendants contended that the plaintiffs were not " prevailing parties" under the statute.

The defendants-appellants argue that since Judge Duncan merely ordered the defendants to consider the obscenity of *Hustler* pursuant to an existing regulation, the plaintiffs are in no better position than before the initiation of legal proceedings and thus the *status quo* is unchanged. Applellants emphasize that although the current regulation was not in effect when plaintiffs first requested *Hustler* in 1976, it was in effect prior to the institution of the lawsuit. Thus defendant-appellants assert plaintiffs have not prevailed.

A party must prevail on "at least some of his claims" to be entitled to fees under the Act. *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980) (Per curiam). Indeed, "[t]he question as to whether the plaintiffs have prevailed is a preliminary determination, necessary before the statute comes into play at all". *Northcross* v. *Board of Education of Memphis City Schools*, 611 F. 2d 624(6th Cir.1979), *cert. denied*, 447 U.S. 911 (1980).

It is true, as appellants assert, that plaintiffs did not gain immediate access to *Hustler*. They did however achieve the right to a determination of the magazine's obscenity in accordance with the district court order. This Circuit has recognized that attorney fees are proper under § 1988 even if plaintiff has not succeeded on every issue of the case. As was stated in *Northcross*, *supra.*, "the notion of 'prevailing party' is to be interpreted in a practical, not formal matter." 611 F. 2d at 636.

Applying the pronouncements of *Northcross*, plaintiffs below have prevailed in a practical manner in that they were afforded the right to a determination under regula-

tions the defendant had previously ignored. Moreover, they became entitled to that determination within 60 days of a request for such a determination, which time period is not mandated by the regulations.

Accordingly, it is hereby ORDERED that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Stewart et al.,

v. Case Number: C-2-78-36

James A. Rhodes et al.,

JUDGMENT
Filed June 4, 1981

This action came on for consideration before the Court, The Honorable Robert M. Duncan United States District Judge, presiding. The issue having been duly considered and a decision having been duly rendered,

IT IS ORDERED THAT: defendants are ordered to pay plaintiffs and their attorneys Five Thousand Three Hundred Six Dollars and Twenty-Five Cents.($5,306.25) in attorney fees and Nineteen Dollars and Sixty Cents ($19.60) in expenses pursuant to 42 U.S.C. § 1988.

Dated at Columbus, Ohio this 4 day of June, 1981.

JOHN D. LYTER, CLERK

BY: /s/ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Stewart et al.,
Plaintiffs

v. Case No. C-2-78-36

James A. Rhodes et al.,
Defendants

MEMORANDUM AND ORDER
Filed June 3, 1981

This matter is before the Court on the motion of plaintiffs for an award of attorney fees pursuant to 42 U.S.C. § 1988 in the amount of $6,285.85. The motion is submitted with an affidavit of counsel and itemized statements of time spent in performing legal services in this case. Defendants oppose the motion on two grounds, claiming that the plaintiffs have not prevailed in the lawsuit so as to be entitled to any attorney fees at all, and that even if entitled to attorney fees, they are not entitled to reimbursement for time spent by law clerks of the firm.

The Court holds that the plaintiffs are "prevailing parties" within the meaning of 42 U.S.C. § 1988. In its decision in *Northcross* v. *Board of Education*, 611 F. 2d 624 (6th Cir. 1979), the Court of Appeals for the Sixth Circuit instructed that the question whether a party has prevailed is the threshold question to be answered before § 1988 comes into play. The circuit court stated:

> The question as to whether plaintiffs have prevailed is a preliminary determination, necessary before the statute comes into play at all. Once that issue is determined in the plaintiffs' favor,

> they are entitled to recover attorneys' fees for "all time reasonably spent on a matter." The fact that some of that time was spent in pursuing issues on research which was ultimately unproductive, rejected by the court, or mooted by intervening events is wholly irrelevant . . . the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith. There are numerous practical reasons why a court may not be permitted to dissect a lawsuit into "issues and parts of issues as to which the plaintiffs did not prevail,". . . . Congress had mandated that the prevailing party's attorney should be compensated " as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on a matter." We know of no "traditional" method of billing whereby an attorney offers a discount based upon his or her failure to prevail on "issues or parts of issues."

Id. at 636. The Court believes this language forcefully answers the defendants' contention that the plaintiffs have not prevailed in this lawsuit. The plaintiffs are inmates or former inmates at the Chillicothe Correctional Institution in the custody of the Department of Rehabilitation and Corrections of the State of Ohio, a department headed by the defendant Denton. They brought this lawsuit after having been deprived of the opportunity to read *Hustler* magazine in the prison. Although the defendants contend that plaintiffs failed to prevail because they failed to obtain the injunctive relief requested in their complaint, the Court finds that plaintiffs' characterization of this lawsuit as having as its gravamen "the unlawful and arbitrary exclu-

sion of Hustler Magazine which the Plaintiffs wished to read," is a more accurate description of the case as a whole.

In its opinion, the Court acknowledged that prisoners surrender certain of their First Amendment rights to the legitimate penological objectives of the corrections system, and that certain censorship of prisoner mail may be justifiable. However, the Court held that the defendants had not endeavored to apply either the procedural or substantive standards established by the courts for determining what printed material can be made available to inmates. Nor had the defendants attempted to follow their own administrative regulations providing a procedure for protecting the rights of the inmates in this regard. Accordingly, the Court ordered the defendants to provide the plaintiffs with notice, an opportunity to be heard, and an ultimate determination by a disinterested decision-maker on the question. Under the circumstances, the plaintiffs have clearly prevailed in this lawsuit.

Defendants' second contention is that the 11.5 hours of law clerk's time, for which plaintiffs seek compensation at the rate of $25.00 per hour, cannot be reimbursed as a part of attorney's fees award. The Court disagrees. As defendants acknowledge, the Sixth Circuit Court of Appeals stated in *Northcross:*

> The authority granted in Section 1988 to award a "reasonable attorney's fee" included the authority to award those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client in the course of providing legal services. Reasonable Photocopying and paralegal expenses and travel and telephone costs are thus recoverable pursuant to the statutory authority of Section 1988.

Id. at 639. The affidavit of counsel for plaintiffs identifies the label "Clerks" on the attached fee bills as referring to law students who have completed two or three years of law school, employed by the law firm to assist in legal research and preparation of briefs, and who are uniformly within the top ten per cent of their graduating class in their respective law schools. This Court has regularly included in attorney fee awards payments, at reduced rates, for like services by law clerks. The practice often reduces the time billed at higher rates by attorneys themselves. However, the Court finds it difficult to justify certain of those expenses. Counsel's schedule lists 2.25 hours of clerk time consisting solely of trips to the courthouse to file papera and 3 hours of clerk time for a trip to the public library to locate a newspaper article regarding a related case. These hours should be excluded from the fee award. This accounts for $131.25 of the requested fee award and reduces it to $6,135.00.

The defendants have not objected to either the time billed or the hourly rates asked by the two lawyers for plaintiffs. The Court finds them, for the most part, to be reasonable. However, counsel's schedule lists 12.75 hours for work done during September 1978 on "proposed findings of fact and conclusions of law" which never found their way into the record. This case was submitted on a stipulation of facts and briefs, the preparation of which constitutes a substantial portion of Counsel's fee request. The Court believes it would be unreasonable to require the State to pay for work done on "findings and conclusions." This accounts for $828.75 of the requested fee award and reduces it to $5,306.25.

Accordingly, defendants are ordered to pay plaintiffs and their attorneys Five Thousand Three Hundred Six Dollars and Twenty-Five Cents ($5,306.25) in attorney

fees and Nineteen Dollars and Sixty Cents ($19.60) in expenses pursuant to 42 U.S.C. § 1988.

It is so ORDERED.

/s/ Robert M. Duncan, Judge
United States District Court

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UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Stewart, et al.,
v.
James A. Rhodes, et al.,

Case Number C-2-78-36

AMENDED
JUDGMENT

Filed May 19, 1981

This action came on for consideration before the Court, The Honorable Robert M. Duncan United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED THAT: The Court orders the defendants, upon request by the plaintiffs or any prisoner of the State of Ohio, to conduct a hearing at which the prisoner or his representative will appear and be heard concerning his wish to receive *Hustler*, the person requesting the hearing will be joined as a party plaintiff in this case, to submit the question anew for a determination and to allow for a disinterested final decisionmaker to determine whether *Hustler* may lawfully be barred from the prison. The defendants may use the procedures outlined in 5190-9-19 (F) and (G) in implementing this order.

Any decision to censor the publication at the institution must be made for reasons that are consistent with penological objectives as stated in *Pell* v. *Procunier, supra; Guajardo* v. *Estelle, supra,* and this opinion.

The defendants are ordered to hold a hearing and

render a decision within thirty (30) days of the date of the request.

Dated at Columbus, Ohio this 19th day of May, 1981

JOHN D. LYTER, CLERK

By: /s/ Deputy Clerk

UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Stewart, et al.,
Plaintiffs,
v. Case Number C-2-78-36

James A. Rhodes, et al.,
Defendants

AMENDMENT TO ORDER
Filed May 18, 1981

It has come to the attention of the Court that in its order of April 1, 1981, and in its judgment of April 2, 1981, the administrative regulations were improperly cited. Accordingly, the last three paragraphs of that order are ordered amended to read as follows:

The Court orders the defendants, upon request by the plaintiff or any prisoner of the State of Ohio, to conduct a hearing at which the prisoner or his representative will appear and be heard concerning his wish to receive *Hustler*, the person requesting the hearing will be joined as a party plaintiff in this case, to submit the question anew for a determination and to allow for a disinterested final decisionmaker to determine whether *Hustler* may lawfully be barred from the prison. The defendants may use the procedures outlined in 5190-9-19(F) and (G) in implementing this order.

Any decision to censor the publication at the institution must be made for reasons that are consistent with penological objectives as stated in *Pell* v. *Procunier, supra; Guajardo*

v. *Estelle, supra*, and this opinion.

The defendants are ordered to hold a hearing and render a decision within thirty (30) days of the date of the request.

The Clerk shall enter amended judgment accordingly.

/s/Robert M. Duncan, Judge
United States District Court

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UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Stewart, et al.,

v. Case Number C-2-78-36

James A. Rhodes, et al.,

JUDGMENT
Filed April 2, 1981

This action came on for consideration before the Court, The Honorable Robert M. Duncan United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED THAT: the defendants, upon request by the plaintiffs or any prisoner of the State of Ohio, to conduct a hearing at which the prisoner or his representative will appear and be heard concerning his wish to receive *Hustler*, the person requesting the hearing will be joined as a party plaintiff in this case, to submit the question anew for a determination and to a allow for a disinterested final decisionmaker to determine whether *Hustler* may lawfully be barred from the prison. The defendants may use the procedures outlined in 5190-9-10 (F) and (6) in implementing this judgment.

Any decision to censor the publication at the institution must be made for reasons that are consistent with penological objectives as stated in *Pell* v. *Procunier*, *supra; Guajardo* v. *Estelle*, *supra*, and the opinion and order in this action.

The defendants are ordered to hold a hearing and render a decision within thirty (30) days of the date of the request.

Dated at Columbus, Ohio this 2 day of April, 1981.

JOHN D. LYTER, CLERK

By: /s/ Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Stewart, et al.,
Plaintiffs
v. Case No. C-2-78-36

James A. Rhodes, et al.,
Defendants

ORDER
Filed April 1, 1981

The motion of the parties to amend the Court's order of February 23, 1981, is GRANTED. The last three paragraphs of that order are ORDERED amended to read:

The Court orders the defendants, upon request by the plaintiffs or any prisoner of the State of Ohio to conduct a hearing at which the prisoner or his representative will appear and be heard concerning his wish to receive *Hustler*, the person requesting the hearing will be joined as a party plaintiff in this case, to submit the question anew for a determination and to allow for a disinterested final decision-maker to determine whether *Hustler* may lawfully be barred from the prison. The defendants may use the procedures outlined in 5190-9-10(F) and(6) in implementing this order.

Any decision to censor the publication at the institution must be made for reasons that are consistent with penological objectives as stated in *Pell* v. *Procunier, supra; Guajardo* v. *Estelle, supra,* and this opinion.

The defendants are ordered to hold a hearing and render a decision within thirty (30) days of the date of the request.

The Clerk shall enter judgment accordingly.

/s/Robert M. Duncan, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Stewart, et al.,
Plaintiffs

v. Case No. C-2-78-36

James A. Rhodes, et al.,
Defendants

OPINION AND ORDER
Filed February 23, 1981

This matter is before the Court for adjudication on the complaint, answer thereto, stipulations of fact, depositions, exhibits and briefs. The action is brought under 42 U.S.C. § 1983 for redress of the alleged deprivation, under color of state law, of plaintiffs' constitutional rights. The plaintiffs seek declaratory and injunctive relief pursuant to 28 U.S.C. § § 2201-02.

The plaintiffs are inmates at the Chillicothe Correctional Institute in Chillicothe, Ohio, in the custody of the Department of Rehabilitation and Corrections of the State of Ohio. The defendants, operating under color of state law as defined in 42 U.S.C. § 1983, have authority over and control of the plaintiffs.

Jurisdiction and venue are not disputed.

FACTS

Plaintiffs allege violations of their First Amendment rights by the defendants' refusal to allow plaintiffs freely to subscribe to and read *Hustler* magazine within the prison.

The refusal is based on several decisions of the Department's Publications Screening Committee and subsequent affirmations of such decisions by Director Denton. During the relevant time period, the Committee operated under two different administrative regulations that defined procedures and standards to be used by the Committee in determining whether a particular publication should be excluded from the prisons.

The following statement of facts has been stipulated by the parties:

1. Defendant George F. Denton, as director of the Ohio Department of Rehabilitation and Corrections, is vested with authority to administer the institution in which plaintiffs are incarcerated. Under his direction the Department has established a policy under which certain publications are not permitted in the institutions under the control of the Department.

2. During 1976 the policy of the Department regarding publications was as embodied in Administrative Regulation 814 (b) (herinafter referred to as "814(b)"). The regulation generally provided that publications could be excluded if they were "obscene" or "inflammatory." A publication was "obscene" if:

> the dominant theme of the publication when considered in its entirety, is patently offensive to prevailing community standards relating to the description or representation of sexual matters, and the publication is utterly void of redeeming social value.
> 814 (b) (3) (A).

As a matter of law, the subject definition failed to meet the test of the Supreme Court as to obscenity as set forth in the case of *Miller* v. *California*, 413 U.S. 15 (1973).

3. Policy 814 (b) (4) was administered by an advisory

Publication Screening Committee composed of four members during the year of 1976. Effective January 1, 1977, the Committee was expanded to five members. The committee members meet irregularly, and often review publications outside of meetings, and then express an opinion in the form of a note as to whether a given publication ought to be permitted or barred. The recommendation of the committee is subject to review by Director Denton and has always been adopted.

4. On or about December 31, 1976, Regulation 5120-9-19 of the Department of Rehabilitation and Correction was adopted and became effective January 1, 1977. This regulation was adopted in compliance with an order of the United States District Court for the Northern District of Ohio. See *Taylor* v. *Perrini*, 413 F. Supp. 189, 214 (1976). It remains effective as of the date relevant to plaintiffs' complaint. It generally provides for the exclusion of material which is "obscene under United States Supreme Court standards." The regulation provides detailed criteria for determining obscenity including a three-part test, found in subparagraphs (D) (1), which test requires a finding by the reviewing authorities that the printed material meets all three subparagraphs. In addition, publications may be prohibited if they are found to be inflammatory pursuant to paragraph (D) (2). Under this regulation, the initial review of printed material is to be done by the mailroom personnel.

5. Since May of 1976, plaintiffs have sought to acquire *Hustler* magazine but were denied permission as a matter of Department of Rehabilitation and Correction policy. It is, however, the policy of the Department to permit inmates to receive *Playboy*, *Penthouse*, *Oui* and *Gallery* magazines, along with other publications devoted to adult entertainment.

6. Prior to May of 1976, inmates were permitted to receive *Hustler*. On May 27, 1976, the Publications Screening Committee voted to remove *Hustler* from the list of permitted publications and to review the magazine on a monthly basis. Since May of 1976, inmates of all penal institutions within the State of Ohio have not been permitted to receive *Hustler*.

7. If called to testify, Stephen Yost would state that he is an attorney who at all times relevant was the Administrative Assistant to the Director of the Ohio Department of Rehabilitation and Correction. He was a member of the Publication Screening Committee in May of 1976. He was aware that 814 (b) did not conform to the definition of obscenity which prevailed under Supreme Court rulings as of May 1976, but he did not advise the members of the committee of this (deposition p.12). His recollection is that the committee generally felt *Hustler* was obscene since it appealed only to prurient interests and had no redeeming social value. There were no discussions of contemporary community standards during the May 1976 deliberations over *Hustler*. Yost was aware that *Hustler* was available generally throughout Ohio but neither that fact nor the fact that monthly circulation exceeded two million influenced the determination of contemporary community standards.

8. If called to testify, Frederick R. Silber would state that he is a clergyman now serving as Administrator of Religious Services for the Department of Rehabilitation and Correction. Since about September of 1975, he has served as convener of the Publication Screening Committee. He participated in committee discussions in May of 1976 regarding *Hustler* but had no vote. He was aware that *Hustler* was on sale throughout Ohio and testified that the committee members were also aware of that fact (deposition p. 13).

9. If called to testify, John Becker would state that he is a librarian at Otterbein College and was a member of the Publication Screening Committee. He voted to exclude *Hustler* because he felt "that as a unit it was just void of any literary or artistic value," and "in poor taste." (Deposition p. 9). He had never seen it for sale in his home community of Westerville, Ohio. He stated that "that's my community"(deposition p. 9 and 13). He therefore felt that it had no place in the community (deposition p. 12). He defined "prurient" as "sexually arousing" (deposition p. 15) in applying 814 (b) to *Hustler*. He regarded his function on the committee as to express his opinion as to what was "good or bad." (Deposition p. 13). He did not regularly read sexually oriented literature that is generally restricted to the adult population (depostion p. 14). The circulation of *Hustler* was irrelevant to the determination of community standards in his view.

10. If called to testify, John B. McTaggart would state that he is Director of Library Sciences at the Methodist Theological School in Delaware, Ohio. He was appointed to the Publications Screening Committee on November 17, 1977. He participated in a review of the April 1978 issue of *Hustler*. According to his interpretation of 5120-9-19, a publication was obscene if it contained a graphic representation of the clitoris (deposition p.7). He did not consider any other aspects of the publication nor did he read the magazine. (Deposition p.7). He was aware that *Hustler* is widely distributed throughout the major urban areas of Ohio but did not take that fact into consideration in making his decision. (Deposition p. 10).

11. If called to testify, S.M. Patterson would state that he is the Assistant Chief of the Division of Institutions, Ohio Department of Rehabilitation and Correction. In voting to bar *Hustler*, he determined from an examination of the magazine as a whole that it was "utterly devoid of

any redeeming social value" and that it was "simply obcene," in his "personal opinion," merely a "matter of pornography." (Deposition p. 9). In his view, depiction of female genitalia was obscene as a matter of law, as is the posing of the body for sexual appetite. (Deposition p.10). Since he viewed the prison community as distinct from the population generally the issue of contemporary community standards was not considered. (Deposition p. 11 and 12).

12. If called to testify, Carolyn A. Watts would state that she is now an Assistant United States Attorney in Cleveland. She served on the Publication Screening Committee in 1976. She voted to bar the June 1976 issue be-- cause the issue contained something that particularly "offended " her conscience. (Deposition p. 9). Because she was unaware of any community standard, she did not apply any such standard when reviewing *Hustler.*

13. If called to testify, Maury C. Koblentz would state that he is the retired Chief of the Division of Special Services and the former Commissioner of Corrections for the Department. He was a member of the Publications Screening Committee from May or June of 1975 until November 1976. In applying 814 (b), Koblentz did not consider the concept of prurience since it was not contained in the regulation. (Depostion p. 10). To determine community standards, he applied his own concept of offensiveness and his personal taste. (Deposition p. 11). The general availability of *Hustler* throughout the marketplace was irrelevant to his deliberations since he regarded standard for obscenity generally as different from standard of obscenity for the prison population (deposition p. 13).

14. Dr. Robert M. Collie is now a member of the Publication Screening Committee and did not act in that capacity during the May 1976 through August 1978 Committee proceedings. Defendants wish to call Dr. Collie as an expert witness. Plaintiffs object to Dr. Collie's qualifications

and believe the entire deposition is incompetent evidence for these proceedings.

15. Administrative Ruling 5120-9-19 makes provision for an appeal to the Publication Screening Committee by the inmate where the prison authorities have determined that a given publication is obscene. No appeal from the Publication Screening Committee exists in the case of a publication placed on the "not permitted" list. No hearings of any type were conducted by the Publication Screening Committee or the Department prior to placing *Hustler* on the "not permitted" list. However, there was a review of the publication by each member of the committee prior to the publication being removed from the permitted list. George F. Denton acted affirmatively on all recommendations relevant to this case but exercised no independent judgment.

16. All issues of *Hustler* since its inception have been sold freely in all jurisdictions of Ohio to the adult public. The only exception to this is Hamilton County wherein the sale has been restricted.

No copy of *Hustler* magazine has ever been adjudicated obscene by any court in the United States with the exception of the July 1975 issue which was adjudicated obscene by Hamilton County Common Pleas Court which case is on appeal in the First Circuit Court of Appeals. No other court anywhere in the United States has ruled any issue obscene.

17. All decisions of the Publications Screening Committee barring *Hustler* magazine from the penitentiary system from May of 1976 through August of 1978, inclusive, were based upon the belief of the Committee that the publications in question were obscene and therefore prohibited pursuant to Section (F)(1) of the regulation. No issue of *Hustler* was ever barred during this period of time because it was inflammatory pursuant to Section (F)(2). For

purposes of this litigation, the final issue being raised in question is the August 1978 issue so that final dispositions may be had and the matters resolved.

The Scope of Plaintiffs' First Amendment Rights

Plaintiffs claim the prison's refusal to permit the plaintiffs to receive *Hustler* magazine deprives them of the exercise of their First Amendment rights. In order to determine whether plaintiffs' claim is meritorious, the Court need first decide the extent of the First Amendment rights of the plaintiffs.

Prisoners do not retain all First Amendment rights, but surrender certain of them to the legitimate penological objectives of the corrections system.

> . . . lawful incarceration brings about the necessary withdrawal of many privileges and rights, a retraction justified by the considerations underlying our penal system . . . In the First Amendment context a corollary of this principle is that a prison inmate retains those First Amendment that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment rights must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner had been committed in accordance with due process of law.

Pell v. *Procunier*, 417 U.S. 817 (1974).

Thus, censorship of prisoner mail is justified if it furthers an important or substantial governmental interest, which is unrelated to the supression of expression, such as security, order and rehabilitation and if it is no greater than

necessary to protect that interest. *Procunier* v. *Martinez*, 416 U.S. 396 (1974).

Grounds for witholding printed material need not be so narrow as those applicable to society at large, such as materials judicially declared obscene, *Guajardo* v. *Estelle*, 580 F. 2d 748 (5th Cir. 1978); nor, for that matter, may they be so broad as to reflect an individual official's personal opinion of what is offensive or inflammatory, *Hardwick* v. *Ault*, 447 F. Supp. 106, 131 (M. D. Ga. 1978).

The applicable law is clearly stated by the Fifth Circuit in *Guajardo* v. *Estelle*, 580 F. 2d 748 (5th Cir. 1978):

> The district court ruled that prison authorities could not ban sexually explicit magazines unless they had been judicially declared obscene. Adoption of that rule would merely state a truism since the Supreme Court has categorically settled that obscenity is outside of the first amendment's protections. *Miller* v. *California*, 413 U. S. 15 (1973); *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966); *Roth* v. *United States*, 354 U.S. 476 (1957). Other circuits have noted that prison officials may deny prisoners access to materials that are not obscene. *Aikens* v. *Jenkins*, 534 F. 2d 751 (7th Cir. 1976). We think that such a rule is mandated by the prison environment. The first amendment rights of the prisoners cannot be evaluated without reference to that environment and to the type of audience it involves. *See Ginsberg* v. *New York*, 390 U. S. 629 (1968); *Miller* v. *California*, *supra*. Prison officials testified that non-consensual homosexuality was a significant problem in Texas prisons. The State of Texas has seen fit to prohibit homosexual acts even between con-

> senting adults. Moreover, the state does not and is not constitutionally required to permit prisoners conjugal visits. Thus, for inmates stimulated by sexually explicit material the temptation to further criminal behavior looms large. We think it clear that a legitimate rehabilitation interest of prison authorities is involved in preventing homosexual acts. We are willing to condone the introduction of material into the prison that would exacerbate the situation. On the other hand, we have just held that censorship may not proceed according to the whims of administrators. For that reason we set out the following guidelines.
>
> Before delivery of a publication may be refused, prison administrators must review that particular issue of the publication in question and make a specific factual determination that the publication is detrimental to prisoner rehabilitation because it would encourage deviate criminal sexual behavior. *See Thibodeaux* v. *State of South Dakota*, 553 F. 2d 558 (8th Cir. 1977); *Carpenter* v. *South Dakota*, 536 F. 2d 759 (8th Cir. 1976), *cert. denied*, 431 U. S. 931 (1977); *Morgan* v. *LaValle*, 526 F. 2d 221 (2d Cir. 1975). Prisoners must, of course, be allowed to appeal that decision through proper administrative channels.

Accord, *Hopkins* v. *Collins*, 548 F. 2d 503 (4th Cir. 1977).

The three procedural requirements of notice, an opportunity to be heard, and an ultimate determination by a disinterested decision-maker are all elements provided by the defendants' existing administrative regulations. However, it is undisputed that the defendants did not oper-

ate according to these regulations in determining whether to ban *Hustler* from the prison population in May 1976. Nor did the defendants follow their own regulations in determining that *Hustler* is "obscene."

It may be that a proper application of the *Miller* v. *California* obscenity test would yield a conclusion that the subject publication is obscene. Moreover, there may well be other legitimate reasons, consistent with penological objectives such as order and rehabilitation, why the prison authorities may properly bar the receipt of *Hustler* by inmates in the prison. These issues, however, are not properly before the Court at this time. It is clear that the defendants have not endeavored to apply either the procedural or substantive standards established by the courts for determining what printed material can be made available to inmates.

The Court accordingly orders the defendants, upon request by any one or more of the plaintiffs, to conduct a hearing permitting a reasonable number of representatives of the plaintiff class to appear and be heard concerning their wish to receive *Hustler*, to submit the question anew for a determination and to allow for a disinterested final decision-maker to determine whether *Hustler* may lawfully be barred from the prison. The defendants may use the procedures outlined in 5190-9-19 (F) and (6) in implementing this order.

Any decision to censor the publication at the institution must be made for reasons that are consistent with penological objectives as stated in *Pell* v. *Procunier*, *supra*; *Guajardo* v. *Estelle*, *supra*, and this opinion.

The defendants are ordered to hold a hearing and render a decision within sixty (60) days of this order.

/s/ Robert M. Duncan, Judge
United States District Court

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

LARRY STEWART, et al.,
Plaintiffs,

vs. Case No. C-2-78-36

JAMES A. RHODES, et al.,
Defendants.

ANSWER

Filed March 15, 1978

Jurisdiction

1) The defendants acknowledge the jurisdiction of this Court in actions brought pursuant to 42 U.S.C. § 1983 and under 28 U.S.C. § 1343, and pursuant to 28 U.S.C. § § 2201 and 2202.

Parties

2) Defendants admit that plaintiffs Stewart and Reese are prisoners of the State of Ohio.

3) Defendants admit that James A. Rhodes is the Governor of the State of Ohio; George F. Denton is the Director of the Ohio Department of Rehabilitation and Correction; and Ted Engle is the Superintendent of the Chillicothe Correctional Institute.

Facts

4) Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraph 4 of the complaint.

5) Defendants admit that Playboy and Penthouse are

usually allowed to be received by prisoners of the State of Ohio. The defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations made in paragraph 5 of the complaint.

6) Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations made in paragraph 6 of the complaint.

7) Defendants deny the allegations made in paragraph 7 of the complaint.

8) Defendants deny the first sentence of paragraph 8 as written. Defendants deny the remaining allegations made in paragraph 8.

9) Defendants deny the allegations made in paragraph 9 of the complaint.

10) Defendants deny each and every allegation not specifically admitted to be true.

First Defense

11) Plaintiffs have failed to state a claim on which relief can be granted.

Second Defense

12) Defendants' actions were based on a good faith reliance upon existing administrative regulation practices and policies of the Ohio Department of Rehabilitation and Corection, having prior approval by the federal judiciary.

Third Defense

13) Plaintiffs have failed to join parties under F. R. Civ. p. 19.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General

/s/ ALLEN P. ADLER, Trial Attorney
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Answer has been forwarded to the Attorney for the Plaintiffs, Laurence E. Sturtz, Brownfield, Kosydar, Bowen, Bally & Sturtz, 140 East Town Street, Columbus, Ohio 43215, via regular U.S. Mail, postage prepaid, this 13th day of March, 1978.

/s/Allen P. Adler
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Larry Stewart, 142--201 :
P.O. Box 5500
Chillicothe, Ohio 45601 :

and :

Albert Reese, 143-437 :
P.O. Box 5500
Chillicothe, Ohio 45601 :
Plaintiffs,
:

v. : Case No. 2-78-36

James A. Rhodes, Governor :
State of Ohio
State House :
Columbus, Ohio 43215

and :

George F. Denton, Director :
Department of Rehabilitation
and Correction
1050 Freeway Drive North :
Columbus, Ohio

and :

Ted Engle, Superintendent :
Chillicothe Correctional
Institute :
P.O. Box 5500
Chillicothe, Ohio 45601 :
Defendants.

Filed January 17, 1978

DECLARATORY JUDGMENT, PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

I. PARTIES

1. Plaintiffs are, at all times herein relevant, prisoners of the State of Ohio in the custody of the Department of Rehabilitation and Corrections. They are currently confined at the Chillicothe Correctional Institute in Chillicothe, Ohio 45601.

2. Defendant James A. Rhodes is the duly elected and acting Governor of the State of Ohio, Defendant George F. Denton, is the duly appointed Director of the Department of Rehabilitation and Corrections. Defendant Ted Engle is the Superintendent of the Chillicothe Correctional Institute. The Defendants in the order listed above are legally responsible for the overall operation of the State's Rehabilitation and Correctional institutes, and more specifically, are directly and indirectly responsible for the overall operation and administration of the institution in which Plaintiffs are now institutionalized.

II. JURISDICTION

3. This is a civil action authorized by 42 USC 1983 to redress the deprivation, under color of state law, of rights,

privileges and immunities secured under the Constitution of the United States. This Court has jurisdiction under 28 USC 1343. Plaintiffs seek declaratory and injunctive relief pursuant to 28 USC 2201 and 28 USC 2202.

III. FACTS

4. On or about the 15th day of June, 1977, Plaintiffs made known to institution officials assigned to the mail room of their desire to subscribe to Hustler Magazine. Plaintiffs have been informed that subscriptions to Hustler were not permitted for inmates and that any issues of Hustler received in the institution mail room would be returned to the publisher or destroyed. Plaintiffs were informed that they would not be permitted to receive Hustler as a matter of Department of Rehabilitation and Correction policy. The policy being followed and executed by Defendant Engle is a policy that was fostered and perpetuated by Defendants Rhodes and Denton.

5. Hustler Magazine is what could be considered to be an adult oriented magazine and in accordance with many rulings of courts around the country, is on a par and similar in content to Playboy and Penthouse Magazines, among others. Both Playboy and Penthouse are publications which have been approved for inmate subscription and are permitted to be received through the institution mail room. Hustler was at one time also an approved publication, however, in 1975, that ruling was altered giving rise to the present practice of not permitting the magazine.

6. No hearings of any type have ever been conducted in this respect and the only reason given by prison officials other than "departmental policy" is allegations that the magazine is obscene. Hustler Magazine is presumably protected First Amendment expression and with the exception of a single case in Cincinnati, Ohio, has never been

declared obscene anywhere in the United States. Furthermore, Hustler Magazine is published and sold via subscriptions through the United States mails, being properly transmitted through the mails with no allegations ever having been raised by any governmental officials that the publication was in violation of the United States mail rules.

7. The actions of the Defendants in banning Hustler Magazine inside the walls of this institution and other institutions around the State of Ohio is arbitrary, capricious, without any legal foundation and based upon no valid evidence. The Defendants in banning the publication are neither judge nor jury nor a tribunal properly charged with declaring the alleged obscenity or non obscenity of the publication.

8. Plaintiffs are adult persons who are possessed of basic constitutional rights including the First Amendment. Plaintiffs have a free choice whether to read or not read various publications including Hustler. No injury will be suffered by Plaintiffs by the reading of said publication. The classification of Hustler Magazine, as opposed to other magazines of like and similar type, to-wit: Playboy or Penthouse is absolutely arbitrary and capricious.

9. The actions of the Defendants are a conserted and systematic attempt to deprive Plaintiffs of rights, privileges and immunities secured to them by the Constitution of the United States. Their actions are discriminatory and in violation of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. Their actions are in deprivation of basic constitutional rights of the Plaintiffs, without proper due process requirements as guaranteed by the Fourteenth Amendment of the Constitution of the United States. Additionally, the materials being sought are protected First Amendment expression and the censorship prohibiting

the same from being delivered to Plaintiffs, at their request, violate the First Amendment of the Constitution of the United States.

10. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs described. Plaintiffs have and will continue to be injured irreparably by the actions of the Defendants unless this Court grants the declaratory injunctive relief sought by Plaintiffs.

WHEREFORE, Plaintiffs pray this Court make and enter a judgment as follows:

1. Declaring the acts, policies and practices of the Defendants as complained of and described herein violate Plaintiffs' rights under the Constitution of the United States.

2. A preliminary and permanent injunction which:
   a. Prohibits the Defendants, their successors in office, agents, employees and all other persons in active concert with them from denying Plaintiffs their right to receive Hustler Magazine, in the future.
   b. Prohibits the Defendants, their successors in office, agents, employees and all other persons in active concert with them from transferring Plaintiffs to any other institution without the consent of Plaintiffs and from retaliating against Plaintiffs in any manner or form whatsoever.

3. For any other relief in law or in equity as the Court deems appropriate and just.

Respectfully Submitted,

/s/Laurence E. Sturtz (STU02)
BROWNFIELD, KOSYDAR, BOWEN
BALLY & STURTZ
140 East Town Street
Columbus, Ohio 43215
(614) 221 - 5834
Attorneys for Plaintiffs

Of Counsel:

Howard Spies
40 West Gay Street
Columbus, Ohio 43215
(614) 464 - 2070

INSTRUCTIONS FOR SERVICE

Please serve the Defendants with a copy of the foregoing Declaratory Judgment, Preliminary and Permanent Injunctive Relief at the following locations by certified mail:

1. James A. Rhodes, Governor
   State of Ohio
   State House
   Columbus, Ohio 43215
2. George F. Denton, Director
   Department of Rehabilitation
   and Correction
   1050 Freeway Drive North
   Columbus, Ohio
3. Ted Engle, Superintendent
   Chillicothe Correctional Institute
   P.O. Box 5500
   Chillicothe, Ohio 45601

/s/ Laurence E. Sturtz (STU02)
Attorneys for Plaintiffs

Ohio Administrative Code Section 5120-9-19.

Printed Materials

(A) Definitions as used in this Administrative Regulation.

(1) "Contemporary community standards" means the standards prevalent in the social environment of an urban center, such as Columbus, Cincinnati or Cleveland, with their range of literature and magazines which are available to the general adult public.

(2) "Taken as a whole" means viewed in its entirety. It does not refer to an isolated depiction or description.

(3) "Serious literary artistic, political, or scientific value" means a substantial value which is not merely a contrivance designed to protect otherwise obscene material.

(4) "Prurient interest" means an interest in that which is lewd or lustful.

(5) "Patently offensive" means a depiction or description, which is graphic or explicit rather than merely suggestive.

(6) "Nudity" means the graphic or explicit portrayal of the naked penis or vagina.

(B) An inmate may receive a reasonable number of printed materials directly from a publisher or distributor. Such materials may be received from other sources such as the inmate's family or friends with prior approval of the managing officer ot his designee. All materials are subject to security inspection and review pursuant to this regulation.

(1) Printed materials falling within the scope of this provision include the following: newspapers; magazines; pamphlets; books; photographs, whether or not of persons known or related to the inmate; drawings; and pre-recorded magnetic tapes. Printed material does not include personal letters.

(2) Printed material, to be excludable, must be obscene or must constitute a clear and present danger to the security or safety of an institution.

(C) Each institution may establish and post regulations limiting the maximum amount of printed material which may be retained by an inmate. Such regulations shall be forwarded to the Director for review and approval.

(D) Printed material may be excluded from an institution for one or both of the following reasons.

(1) The printed material is obscene under United States Supreme Court standards. In order to be considered obscene and thus subject to exclusion, printed material must meet all the following three standards, which should be considered in the order stated below.

(a) The printed material depicts or describes, in a patently offensive way, conduct falling within one or more of the following categories.

(i) Nudity emphasizing a state of sexual arousal or stimulation; for example, a male erection or graphic exposure of the clitoris.

(ii) Nudity emphasizing masturbatory activity.

(iii) Portrayal of explicit sexual acts, heterosexual or homosexual, including vaginal, anal, oral, and manual acts.

(iv) Portrayal of acts of bestiality; that is, sexual relations between human being and an animal.

(v) Portrayal of acts of sado-masochism emphasizing the infliction of pain.

(vi) Portrayal of an excretory function.

(b) The average person, applying contemporary community standards, would find that the printed material, taken as a whole, appeals to the prurient interest.

(c) The printed material, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(2) The printed material is inflammatory; that is, the presence of the printed material in the institution would constitute a clear and present danger to the security or safety of the institution. No publication shall be considered inflammatory solely on the basis of its appeal to a particular ethnic, racial, or religious audience. In order to constitute a clear and present danger to the security or safety of the institution, the printed material must meet at least one of the following criteria.

(a) Printed material which incites, aids, or abets criminal activity, such as rioting or illegal drug use.

(b) Printed material which incites, aids, or abets physical violence against others, including instruction in making, using, or converting weapons.

(c) Printed material which incites , aids , or abets escape, such as instruction in picking locks or digging tunnels.

(E) The Director shall appoint an advisory Publication Screening Committee composed of five members. At least one member of the committee shall be an attorney, at least one shall be experienced in the area of literature, at least one shall be a full-time departmental employee, and at least one shall not be a departmental employee.

(F) All incoming printed material shall be screened by the institution mail office. All printed material which is found to be neither obscene nor inflammatory shall be promptly for· arded to the addressee. All printed material which the mail office reasonably believes to be either obscene or infammatory shall be withheld from the inmate. The mail office shall promptly notify the inmate of the identification of the printed material, the reason for its being withheld, and the inmate's right to a review by the managing officer or his designee.

(1) When the inmate requests a review of the mail office's decision to withhold the printed material, the printed material shall be forwarded to the managing officer or his designee, which may be a panel of three or more members, only one of whom may be from the custody staff.

(a) As soon as practical after receipt of the printed material, the managing officer or his designee shall decide whether the printed material is acceptable. A hearing at which the inmate is present may be conducted to aid the managing officer or his designee in making that decision.

(b) A decision to exclude the printed material shall be in writing, setting forth that the material is either obscene or inflammatory, or both, and the reason(s) therefore. A copy of such written decision shall be forwarded promptly to the inmate together with notice of the inmate's right to request within seven days review by the Publication Screening Committee. The managing officer or his designee shall maintain a written record of such decisions for at least one year.

(c) If the decision of the managing officer or his designee is that the printed material should not be excluded, the printed material shall be forwarded promptly to the inmate.

(2) Failure of the inmate to request review of the mail office's decision to withhold the printed material, within seven days of notice thereof, shall constitute acceptance of that decision and the printed material shall be disposed in accordance with paragraph (H) below.

(3) Failure of the inmate to request review of the decision of the managing officer or his designee by the Publication Screening Committee within seven days after notice thereof shall constitute acceptance of that decision and the printed ma-

terial shall be disposed in accordance with paragraph (H) below.

(G) When the inmate timely requests review by Publication Screening Committee, the managing officer or his designee shall forward the printed material together with the written decision concerning it to the Publication Screening Committee.

(1) The Publication Screening Committee shall immediately notify the Department and all institutions of the challenge of any printed material and all deliveries of the challenged printed material shall be stayed.

(2) The Publication Screening Committee shall, within 28 business days, recommend to the Director whether the printed material is obscene or inflammatory. The committee shall use as its criteria the standards set forth above and shall consider both the institution's reasons for excluding the printed material and objections of the inmate, if any are received.

(3) If the Director determines that the printed material is neither obscene nor inflammatory, it shall be forwarded to the inmate addressee and all managing officers of the institution shall be informed of the decision.

(4) If the Director determines that the printed material is either obscene or inflammatory or both, the managing officer of the challenging institution and the inmate to whom it was addressed shall be informed in writing that the printed material is being excluded from the institution and the reasons therefore. At that time, all other

managing officers shall be notified of the decision.

(H) Printed material which is excluded pursuant to this administrative regulation may be disposed at the discretion of the managing officer in any of the following manners:

(1) At the request of the inmate destroyed or forwarded to an approved visitor at the inmate's expense.

(2) Returned to the United States Postal Services.

(3) Held as evidence.

(I) The Director or his designee shall compile and periodically update a list of printed materials which have been reviewed by the Publication Screening Committee and found to be unacceptable. The list shall be forwarded to all institutions, and shall be available in the mail office, Inspector of Institutional Services office, legal-services office, library, and other locations designated by the managing officer. No listed printed material may be admitted to the institution. The mail office shall notify the inmate that the material has been excluded by order of the Director, and the material shall then be disposed in accordance with Paragraph (H) above.

A - 49

Effective Date — December 31, 1976
Former Rule Number — 814 (b)
Promulgated Under —111.15
Statutory Authority — 5120.01
Expires — Indefinite

CERTIFIED

Date: December 21, 1976
Signature : /s/ George F. Denton, Jr.

CASE NO. 82-1335

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JAMES A. RHODES, et al.,

Petitioners

vs.

LARRY STEWART, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES OF COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S MEMORANDUM OPPOSING PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In May of 1976, Respondents, who were incarcerated under the jurisdiction of Petitioners, made known their desire to subscribe to Hustler Magazine. The prisoners were informed that subscriptions to Hustler Magazine were not permitted for inmates and that any issues of Hustler Magazine received in the institution mail room would be returned to the publisher or destroyed. This was said to be a matter of policy in the Ohio Department of Rehabilitation and Corrections. No hearing on Respondents' request was ever held. In addition, no reason other than "departmental policy" was advanced to support Petitioners' rejection of Respondent's request.

On January 17, 1978, Respondents filed an action against Petitioners seeking a declaratory judgment and injunctive

relief. The gravamen of this action was that the Petitioners had arbitrarily denied the right of Respondents to read Hustler Magazine because of a "departmental policy" that the magazine was obscene, per se. Respondents asked for a judgment declaring that the policies and the practices of the Petitioners violated Respondents' constitutional rights and for injunctive relief.

After depositions of the members of the Periodical Screening Committee of the Department of Corrections were taken, the parties entered into an extensive stipulation of facts. The case was submitted to the trial court on the depositions and the extensive stipulations.

The District Court rendered an Opinion and Order on February 23, 1981, finding that

> it is undisputed that the [Petitioners] did not operate according to [their own] regulations in determining whetner to ban Hustler Magazine from the prison population in May of 1976. Nor did the [Petitioners] follow their own regulations in determining that Hustler Magazine is obscene.
>
> [Opinion and Order, District Court (Appendix p. A-30, 31)].

Contrary to the suggestion in the Petition for Writ of Certiorari, the regulation referred to in the Petition was not effective at the time the acts complained of occurred in May of 1976. The parties had stipulated that the original regulation was unconstitutional in that it did not properly define obscenity. The District Court expressly found:

> 5. Since May of 1976, [Respondents] have sought to acquire Hustler Magazine but were denied permission as a matter of Department of Rehabilitation and Correction policy . . .

> 6. Prior to May of 1976, inmates were permitted to receive Hustler. On May 27, 1976, the publication screening committee voted to remove Hustler from the list of permitted publications and to review the magazine on a monthly basis. Since May of 1976, inmates at all penal institutions within the State of Ohio have not been permitted to receive Hustler.
>
> [Opinion and Order, District Court (Appendix p. A-23, 24)]

The District Court entered a judgment which was ultimately for the benefit of all persons incarcerated under the authority of the Ohio Department of Rehabilitation and Correction who had a desire to read Hustler Magazine. Prior to the entry of judgment in February of 1981, both Respondents had been released from confinement. Therefore, Judge Duncan granted a post-judgment request made by the parties jointly that the Order be amended so that the injunctive relief would thereafter become effective upon the request of a party not origi-

nally named as a Plaintiff. [Order, District Court, April 1, 1981 (Appendix A-19)].

The conduct of the Petitioners in excluding Hustler Magazine from the penitentiary system continued from May of 1976 through August of 1978. The parties selected this cut-off date for practical litigation reasons:

> For purposes of this litigation, the final issue being raised in question is the August 1978 issue so that final dispositions may be had and the matters resolved. [Opinion and Order (Appendix A-27,28)].

As found by the District Court, these decisions were based upon the belief of the Committee that the publications were obscene and therefore prohibited pursuant to Regulation 5120-9-19(F)(1) of the Department of Rehabilitation and Correction. Thus, the offending conduct continued well after the suit was filed

and over a year after the new regulation was adopted.

SUMMARY OF RESPONDENTS' ARGUMENT

Petitioner has misconstrued the facts of the case in order to induce a writ of certiorari. The Respondents, on their behalf and on behalf of other inmates, obtained declaratory and injunctive relief vindicating their constitutional right to read any matter not inconsistent with penological objectives.

The Petitioners failed to prove that Hustler had been lawfully placed on the "not permitted" list. The district court found that the exclusion of Hustler was unlawful, arbitrary, and in disregard of Petitioners' own regulations.

Correctly understood, the decision of the district court on the fee application

and the decision of the court of appeals are consistent with decisions of this court and other courts which have liberally construed the phrase "prevailing party" to include civil rights plaintiffs who succeed in vindicating important constitutional rights. As a practical matter, Petitioners lost and the Respondents prevailed.

ARGUMENT AGAINST GRANTING CERTIORARI

A. Petitioner has Misstated Relevant Facts

Petitioners contention that the Decision in this case is in conflict with Decisions of this Court and with Decisions of other Cricuit Courts of Appeal is based upon an incorrect statement of facts. Petitioners statement

that at the time the instant action was commenced "the Ohio Department of Rehabilitation and Correction was screening publications under a constitutionally sound policy" (Petition for Writ of Certiorari, p. 8) is both disputed and not true. The District Court expressly found that Petitioner had consistently failed to comply with constitutional mandates in arbitrarily banning Hustler. [Opinion and Order, District Court, (Appendix A-30, 31)].

> It is clear that the defendants have not endeavored to apply either the procedural or substantive standards established by the courts for determining what printed material can be made available to inmates.
>
> [Opinion and Order, District Court (Appendix A-30, 31)]

This express finding by the District Court was not appealed. Petitioners' attempt to collaterally attack this finding was also made, unsuccessfully, in the Sixth Circuit Court of Appeals.

> The trial court found, on stipulated facts, that the defendants had not implemented their own applicable regulations in proscribing Hustler as obscene . . . No appeal was taken from this order. Accordingly, no issue with regard to the validity of the order is before this Court.
>
> [Order, Sixth Circuit Court of Appeals (Appendix A-4)]

Petitioners denied that their activities violated the constitutional rights of the Respondents, but they failed to prove that the magazine was permanently banned for reasons consistent with constitutional principles. Petitioners simply lost their case. The district court then ordered that the regulation be followed, as it had not been, and further ordered that the magazine not be barred unless and until Petitioners complied with the District Court's Opinion and Order (Appendix A-31). This judgment of the District Court was not appealed by Petitioners.

The manner in which Respondents prevailed in the District Court, and obtained practical relief, is clearly demonstrated by reviewing the procedure employed by the Petitioners prior to this action to ban Hustler with the requirements imposed by the District Court.

The constitutionally improper manner in which Petitioners banned Hustler, prior to this action, is revealed in the District Court's Findings of Fact Numbers 7-13. (Appendix A-24, 25, 26). The District Court found that Petitioners had failed to comply with the constitutionally required procedural and substantive standards in determining to ban Hustler. [Appendix A-31]. This was the procedure employed by Petitioners in banning Hustler:

> No appeal from the Publication Screening Committee exists in the case of a publication placed on the "not permitted" list. No hearings of any type were con-

ducted by the Publication Screening Committee or the Department prior to placing Hustler on the "not permitted" list.

[Opinion and Order (Appendix p. A-27)]

Contrast this with the requirements imposed by the District Court.

IT IS ORDERED AND ADJUDGED THAT: the defendants, upon request by the plaintiffs or any prisoner of the State of Ohio, to conduct a hearing at which the prisoner or his representative will appear and be heard concerning his wish to receive Hustler, the person requesting the hearing will be joined as a party plaintiff in this case, to submit the question anew for a determination and to allow for a disinterested final decisionmaker to determine whether Hustler may lawfully be barred from the prison. The defendants may use the procedures outlined in 5190-9-10(F) and (6) in implementing this judgment.

Any decision to censor the publication at the institution must be made for reasons that are consistent with penological objectives as stated in Pell v. Procunier, supra; Guajardo v. Estelle, supra, and the opinion and order in this action.

The defendants are ordered to hold a hearing and render a

decision within thirty (30) days of the date of the request.

[Judgment, District Court (Appendix A-17)]

Petitioners' argument that the District Court passed on the constitutionality of the "new" regulation is both specious and irrelevant. After reviewing the newly adopted regulation, the District Court found that three procedural requirements were indeed encompassed in the new regulation, but concluded:

> However, it is undisputed that the defendants did not operate according to these regulations in determining whether to bar Hustler from the prison population in May, 1976. Nor did the defendants follow their own regulations in determining that Hustler is "obscene". . .
>
> It is clear that the defendants have not endeavored to apply either the procedural or substantive standards established by the courts for determining what printed material can be made available to inmates.

Petitioners' argument is irrelevant because the court found that both regulations had been ignored between May of 1976 and August of 1978 when the case was submitted.

Petitioners also argue that the district courts' decision merely "maintains the status quo". This argument disregards the obligatory and commanding character of Judge Duncan's Order. The Order subjects Petitioners to enforcement by contempt of court proceedings, and, as amended, makes the relief of the Order available to any prisoner seeking to receive Hustler. The Order represents a total change in the status quo.

B. No Conflict With Decisions of this Court

For the reasons stated by the courts below, the award of attorneys fees is

consistent with Hanrahan v. Hampton, 446 U.S. 754 (1980) (per curiam) because the inmates alleged and proved that exclusion of Hustler was unlawful and arbitrary since the defendants had disregarded their own regulations. Not only were the defendants ordered to comply with regulations they had previously ignored, they were also enjoined from banning Hustler except for reasons consistent with penological objectives as established by courts of the United States in earlier prisoners' rights cases.

On appeal, the Sixth Circuit Court of Appeals correctly interpreted and applied Hanrahan v. Hampton, supra, and its own earlier decision in Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), cert. den'd. 447 U.S. 911 (1980). The "practical manner" standard of Northcross was met since the inmates were awarded a declara-

tory judgment that the regulation had been ignored, and that, even if followed, it had to be applied in a manner consistent with penological objections.

This Court has repeatedly emphasized that the award of attorneys' fees for successful prosecution of actions to vindicate civil rights is to be the rule unless special circumstances would render such an award unjust. Newman v. Piggie Park Enterprises, 390 U.S. 400, 19 L. Ed.2d 1263, 88 S. Ct. 964 (1968) and Roadway Express, Inc. v. Piper, Jr., 447 U.S. 752, 65 L. Ed.2d 488, 100 S. Ct. 2455 (1980).

Whether the Publications Screening Committee followed either A.R. 5120-9-19 or its predecessor and applied them in a manner consistent with penological objectives were the only significant issues the district court reached below.

On those issues, the Respondents undeniably prevailed, and the Petitioners lost.

The District Court, in awarding Respondents attorneys fees, summarized its conclusion that Respondents were prevailing parties:

> However, the Court held that the defendants had not endeavored to apply either the procedural or substantive standards established by the courts for determining what printed material can be made available to inmates. Nor had the defendants attempted to follow their own administrative regulations providing a procedure for protecting the rights of the inmates in this regard. Accordingly, the Court ordered the defendants to provide the plaintiffs with notice, an opportunity to be heard, and an ultimate determination by a disinterested decision-maker on the question.
>
> Under the circumstances, the plaintiffs have clearly prevailed in this lawsuit.
>
> [Memorandum and Order, June 3, 1981 (Appendix 10)]

The Sixth Circuit Court of Appeals agreed that Respondents were indeed prevailing parties.

> Applying the pronouncements of Northcross, plaintiffs below have prevailed in a practical manner in that they were afforded the right to a determination under regulations the defendant had previously ignored. Moreover, they became entitled to that determination within 60 days of a request for such a determination, which time period is not mandated by the regulations.
>
> [Order, Sixth Circuit (Appendix A-5, 6)]

The Decision of the Sixth Circuit in the instant case is not in conflict with Decisions of this Court or with Decisions of other Circuit Courts of Appeal. As previously discussed, Petitioners contention to the contrary is founded upon Petitioners attempt to alter the facts found by the District Court, and with respect to which no appeal was taken.

There is no merit in petitioner's argument that the inmates "position" had been unchanged by the decision. The state recognized the propriety of the judgment based upon stipulated facts and

did not move to dismiss the case after termination of the Plaintiff's incarceration. The state did not appeal the judgment on the ground that the request for relief was moot. Indeed, the order was later amended to grant class-wide relief upon joint motion of the parties (A-19).

The vindication of rights by the plaintiff is the touchstone of 42 U.S.C. §1988, not the monetary or other intrinsic value of the relief obtained, as this Court suggested in discussing legislative history in Hanrahan, supra at 674. The right to due process and no more censorship than necessary to meet legitimate penological objectives are very substantial rights of inmates, and the District Court's order vindicates them.

Because of this proper emphasis on the vindication of civil rights,

petitioner's argument that no case or controversy existed is also without merit. Notwithstanding the failure to raise this issue earlier, the scope of the declaratory and injunctive relief extends to all inmates. Assuming arguendo, that Ashcroft v. Mattis, 431 U.S. 171 (1977) has some relevance to this case, the decision involved "present rights" of other inmates, and the standard of Ashcroft is therefore met.

Similarly, no argument was raised below concerning whether the Plaintiffs were only successful on some but not all issues. Even if it were proper to assume the outcome of this Court's deliberations on Hensley v. Eckerhart, 664 F.2d 294 (8th Cir. 1981) cert granted, ___ U.S. __ 71 L.Ed.2d 847 (1982), there is no apparent conflict between the Eighth Circuit and the Sixth Circuit with respect to this judgment. Petitioner

does not suggest any issue upon which the inmates failed. The only issue reached by the District Court was the "unlawful and arbitrary exclusion of Hustler". That Plaintiffs had not get all the relief they originally demanded does not mean they failed on some legal issue in the case.

C. No Conflict with Other Circuits

The determination that these inmates succeeded in vindicating their constitutional rights and are therefore "prevailing parties" for purposes of 42 U.S.C. §1988 is consistent with every reported circuit decision on this issue. Petitioner makes no meritorious argument that the appellate court disregarded or misunderstood any controlling precedent. The appellate court did not distinguish or name any inconsistent authority. The formulation of the Sixth Circuit in

Northcross, supra, applied and followed here, does not differ materially from Smith v. University of North Carolina, 632 F.2d 316 (4th Cir. 1980). One need look no further than the stipulated facts to conclude that existence of a right to procedural due process and substantive constitutionality was properly established in favor of the inmates by the judgment.

On this central issue the inmates prevailed, and the petitioners lost, not because they were "informed" of a right to an appeal, but because the court found that the regulation had been ignored. This finding and the order to comply with the regulation is the "establishment of a right or proscription of a wrong" under the Smith formulation.

Petitioners' argument premised on Harrington v. Vandalia Butler Board of Education, 585 F.2d 192 (6th Cir. 1978),

cert. den'd, 441 U.S. 932 (1979) is inapposite. In Harrington, the plaintiff teacher was found to have no cause of action supporting any form of relief under the Civil Rights Act of 1964, 42 U.S.C. §2000(e)-5(k) (1976) at the time she brought her suit, even though the district court found that her rights had been violated. Consequently she was not a "prevailing party." In contrast, disregard of both the old and new regulations and the arbitrary exclusion of Hustler did establish a cause of action in the inmates at the time suit was filed which entitled them to relief. Petitioners fail to see this compelling distinction or grasp its significance.

D. Importance of the Issues

The determination of a prevailing party is undeniably an important and significant issue in civil rights fee

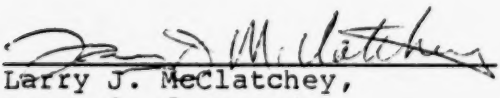
litigation. The circuits have various formulations of "prevailing party", but these inmates would have succeeded under the rule of any other circuit. There is uniformity in application of the principle as established by Newman v. Piggie Park Enterprises, supra, that a prevailing party is to recover fees absent special circumstances. There is consistency in focus on the vindication of the right at issue as the fundament for the award of fees.

The legislative history of 42 U.S.C. §1988 is quite clear in directing the courts to construe the statute broadly in order to encourage the prosecution of civil rights litigation by "private attorneys general". Indeed, the act should be liberally construed to achieve the public purposes sought to be served by statute. The decisions of the district court and the appellate court carry out these purposes.

E. Conclusion

The decision in this case is consistent with both of these principles. Significance of the attorneys fee question, in the abstract sense, does not justify the requested writ. Consequently, there is no compelling issue raised in this case which would justify a writ of certiorari and the Petitioners' motion should be denied.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Respondent's Memorandum Opposing Petition for Writ of Certiorari was served upon Anthony Celebrezze, Attorney General of the State of Ohio and Allen P. Adler, Counsel of Record for Petitioners, Assistant Attorney General, State Office Tower, 26th Floor, 30 East Broad Street, Columbus, Ohio 43215 by regular U.S. mail, postage prepaid, this 26th day of April, 1983.

Larry J. McClatchey

Case No. 82-1335

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

JAMES A. RHODES, et al.,

Petitioners,

vs.

LARRY STEWART,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF TO BRIEF IN OPPOSITION TO CERTIORARI

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REPLY ARGUMENT IN SUPPORT OF CERTIORARI

The questions posed by the petitioners are:

1) Is an award of attorneys' fees made to a plaintiff pursuant to 42 U.S.C. Section 1988 proper where the plaintiff has not prevailed as a practical matter?

2) Is an award of attorneys' fees made pursuant to 42 U.S.C. Section 1988 proper where there has been no adjudication of a present right or proscription of a present wrong?

3) Should the plaintiff be allowed attorneys' fees for all the time spent litigating a matter where he prevails in only a fraction of his claims and receives only part of the relief requested?

Respondent's brief in opposition to certiorari suggests that the respondent continuously appealed the ban on "Hustler Magazine " from May, 1976 to August, 1978; that he appealed to the petitioners; that the appeal was continuously denied; and that the petitioners disregarded Ohio Administrative Code Section 5120-9-19 (A-42) in deciding his appeal. The impression left by respondent's brief is unsupported by the record.

On page 1 of his brief, the respondent claims that he made his desire to receive "Hustler Magazine" known to the petitioners in May, 1976; that he was denied permission; that the denial was arbitrary; and that he was denied a proper appeal under Section 5120-9-19. The record shows that the magazine was banned from Ohio's prisons in May,

1976 under former Administrative Regulation 814. (A-22) The respondent alleged that he made his desire to receive the magazine known for the first and only time on June 15, 1977 (A-37) to unnamed employees of the state, not to the petitioners. The respondent has never appealed the ban to the petitioners pursuant to Section 5120-9-19; nor has any Ohio prisoner requested permission to receive "Hustler Magazine" since May, 1976. The petitioners have never ignored Section 5120-9-19 in banning "Hustler Magazine". They have never reviewed "Hustler Magazine" under Section 5120-9-19 because neither the respondent nor any other Ohio prisoner has requested a review since January 1, 1977, the effective date of the section.

The respondent's claim that he has won a right to receive "Hustler Magazine" through his litigation is false. The respondent has gained no such right; the right to appeal was granted by the enactment of Section 5120-9-19. At most, his case has resulted in a declaratory judgment that Section 5120-9-19 meets constitutional standards and should be used to determine whether or not "Hustler Magazine" should be permitted inside Ohio's prisons. The only finding adverse to the petitioners was that "Hustler Magazine" was banned seven (7) months before the enactment of Section 5120-9-19.

The petitioners might claim that they have prevailed. The petitioners were not ordered to allow state prisoners access to "Hustler Magazine". Their regulation was held to be constitutional (A-30), and the respondent was directed to file an appeal (A-13); an action he has never taken. The district court's order did not create a right, proscribe a wrong, or enhance the enjoyment of a right. The order simply informed the respondent that he, along with all Ohio prisoners, had enjoyed an opportunity to appeal the ban on "Hustler Magazine" since January 1, 1977 and directed him to follow the proper procedure in his appeal.

The parties were left in the same positions they occupied on the date suit was filed.

The confusion surrounding the grant of attorneys' fees continues. The United States Court of Appeals for the Sixth Circuit has further confused the issue. In this case, an award of attorneys' fees based on nothing more than a declaratory judgment that the regulation in question, a regulation adopted a year before suit was filed, was constitutionally sound and should be followed was affirmed. There was no finding that the respondent had been denied a right. In a later case, *Othen* v. *Ann Arbor School Board*, 699 F. 2d 309 (6th Cir. 1983), the same court affirmed a denial of fees, stating:

> If, as a matter of fact, the lawsuit was not causally related to securing the relief obtained, the plaintiff was not a "prevailing party." *Id.* at 313;

and:

> If the requesting party has not prevailed in fact, that is the end of the matter. While the Civil Rights Attorney Fee Act was designed to provide compensation for attorneys who undertake legal action to vindicate the civil rights of groups and individuals, the "prevailing party" requirement forbids the award of fees where no benefit accrues from the action. *Id.* at 314.

Here, as in *Othen*, no benefit accrued from respondent's suit and the enactment of Section 5120-9-19 was not causally related to the respondent's action.

Certiorari should be granted to give definitive guidance to the federal judiciary in determining the existence of a prevailing party in the context of 42 U.S.C. Section 1988.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Petition for Writ of Certiorari have been served on the respondent by forwarding such copies to Larry J. McClatchey, Brownfield, Bowen and Bally, 140 East Town Street, Columbus, Ohio 43215, by United States mail, postpaid, this _____ day of MAY, 1983. I further certify that all parties required to be served have been served.

ALLEN P. ADLER
Assistant Attorney General